

**BEST AVAILABLE COPY**

(I)

### QUESTIONS PRESENTED

The only real question presented to this Court is whether this Court should remand this case to the United States District Court for an evidentiary hearing regarding whether LTV Steel Company, Inc. can afford restoration of the pension plans in question.

(II)

(III)

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**In the Supreme Court of the United States**

**— OCTOBER TERM, 1989**

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**No. 89-390**

**PENSION BENEFIT GUARANTY CORPORATION,**

**PETITIONER**

**v.**

**LTV CORPORATION, ET AL.**

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**ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT**

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**BRIEF OF RESPONDENT BANCTEXAS DALLAS, N.A.**

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**STATEMENT OF THE CASE**

The statement of the case is accurately presented by the Pension Benefit Guaranty Corporation in its brief.

**SUMMARY OF ARGUMENT**

This case concerns the Pension Benefit Guaranty Corporation's ("PBGC") efforts to reinstate pension plans of LTV Steel Company, Inc. ("LTV Steel") which were improvidently terminated. The District Court ruled that reinstatement of these improvidently terminated pension plans was appropriate if the PBGC could demonstrate, by providing a sufficient administrative record, that the plans would not be inevitably re-terminated. The District Court further ruled that the PBGC had not provided a sufficient administrative record to demonstrate the affordability of the pension plans

by LTV Steel. On appeal the Second Circuit affirmed in all respects the District Court's decision, 875 F.2d 1008.

BancTexas maintains that the PBGC had the right to restore the pension plans in question if such restoration will not inevitably result in retermination of the effected pensions plans. Thus, BancTexas Dallas, N.A. ("BancTexas") believes that the Second Circuit's decision should be affirmed and this case remanded to the District Court. At the District Court, the PBGC can quickly and easily supplement its administrative record by presenting evidence to the District Court to demonstrate that restoration of the terminated pension plans pursuant to Section 4047 of The Employee Retirement Income Security Act of 1974, as amended ("ERISA") was appropriate, that LTV Steel can afford the restored plans, and that subsequent retermination is not inevitable.

### ARGUMENT AND AUTHORITIES

The PBGC posited two theories for restoration of the pension plans. First, the PBGC contended that utilization of a follow-on plan constituted a substantial abuse and justified restoration. The PBGC has fully elaborated on this theory in its brief.

Second, the PBGC concluded that restoration was warranted because the fortunes of LTV Steel had improved to the point where LTV Steel could now afford to make the required payments if the pension plans were restored. This "affordability" theory is also discussed by the PBGC in its brief. The District Court ruled, and the Second Circuit affirmed, that the PBGC could not prevail on its "abuse" theory because it was legally and factually unsound.

Likewise, the Second Circuit affirmed the District Court's finding that although the administrative record of the PBGC was not complete enough to support its affordability theory,

if the PBGC could supplement its administrative record to demonstrate affordability, restoration of the pension plans was proper pursuant to Section 4047 of ERISA. (875 F.2d 1008 at pg. 1020.)

The PBGC cannot prevail under either its abuse theory or its affordability theory unless it demonstrates that restoration of the pension plans will not inevitably lead to retermination and that LTV Steel can afford to service the restored pension plans. In order to prevail under its "abuse" theory, the PBGC must establish additional factors, including the inherent legal viability of the theory. Devotion of this Court's time to this academic question of "abuse" is an exercise in redundancy since restoration of the pension plans is appropriate if affordability is established and "abuse" cannot be established absent affordability.

BancTexas fails to understand why the PBGC does not simply present competent evidence directly to the District Court in support of its affordability theory.\* Everyone, including the PBGC, agrees that it would be improper for the PBGC to restore the pension plans if retermination of the pension plans is inevitable. Consequently, in order to act appropriately under Section 4047 of ERISA, the PBGC must be able to demonstrate that it is reasonably likely that the pension plans will not require retermination in the near future. Both the District Court and Second Circuit's opinion give the PBGC the opportunity to make such a determination either directly to the District Court or through an administrative process which will subsequently be reviewed by the District Court under an arbitrary and capricious standard.

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\* Perhaps the PBGC's approach, and its current financial plight, can be attributed to the fact that the PBGC was modeled after the now defunct Federal Savings and Loan Insurance Corporation. See FN4 and text accompanying FN5, pgs. 3 and 4 of the PBGC Brief.

Instead of wasting this Court's time attempting to establish its abuse theory, the PBGC should present evidence directly to the District Court since it cannot prevail under either an abuse theory or an affordability theory unless it can establish affordability.

While the media has widely reported the District Court and Second Circuit's opinions as a victory for LTV Steel, BancTexas believes that ultimately the ruling is more beneficial to the PBGC since the ruling established the PBGC's right to reinstate the pension plans upon a simple showing that the fortunes of LTV Steel have improved to the point where LTV Steel can now afford to fund the reinstated plans. Mechanisms exist under the Bankruptcy Code which will allow the available cash flow of LTV Steel to be utilized to fund reinstated pension plans.

The Chapter 11 case of LTV Steel has been pending since June of 1986. For reasons which remain unarticulated, the PBGC has failed to supplement its administrative record regarding the restoration of the pension plans in question. In the meantime, creditors and other parties-in-interest have been stymied in their attempts to reorganize LTV Steel and its affiliates, including The LTV Corporation ("LTV"). Although some further delay is inevitable, neither the Bankruptcy Code nor ERISA contemplates protracted administrative review which will further delay the reorganization of LTV Steel and LTV. The PBGC has admitted its inability and unwillingness to balance the competing policies of the Bankruptcy Code and ERISA. PBGC Brief, Part III. To the extent possible, further delay should be avoided. Under these circumstances, further development of an administrative record by the PBGC would be superfluous since such action will be inevitably reviewed by the District Court which can and will balance the appropriate competing statutory policies. See *Midlantic National Bank v. New Jersey*

*Department of Environmental Protection*, 474 U.S. 494 (1986). The rights of all the parties, including the PBGC, LTV Steel, LTV and their respective creditors and other parties-in-interest will be best served by a direct presentation by the PBGC to the District Court of its evidence regarding affordability. No provision of ERISA prohibits such a procedure. Accordingly, the decision of the Second Circuit should be affirmed and this case should be remanded to the District Court for an evidentiary determination of the affordability issue.

### CONCLUSION

WHEREFORE, PREMISES CONSIDERED, BancTexas respectfully prays that this Court affirm in all respects the Second Circuit's decision of May 12, 1989, and remand this case to the District Court for an evidentiary hearing on the issue of affordability.

RESPECTFULLY SUBMITTED.

ROBIN E. PHELAN  
KATHRYN C. MALLORY

HAYNES AND BOONE  
3100 NCNB Plaza  
901 Main Street  
Dallas, Texas 75202-3714  
(214) 670-0550

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